The following constitutes the order of the Court.

Signed October 20, 2005

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
MICHAEL J. STICHT, ROBERTA B. CRAVEN, WOMAN'S TOUCH CUSTOM HOMES, AND WOMAN'S TOUCH INTERIORS & GIFTS	§	
Debtors	§	CASE NO. 02-45979-DML-7
	§	
JOHN KIRCHNER, MICHELLE KIRCHNER, PAUL GALLAGHER, LAURA GALLAGER and JUDITH OETTING,	§	
Plaintiffs	§	
	§	
vs.	§	ADV. NO. 03-4003
	§	
MICHAEL J. STICHT and ROBERT A. CRAVEN, d/b/a WOMAN'S TOUCH CUSTOM HOMES and WOMAN'S TOUCH INTERIORS & GIFTS,	§	
Defendants	§	

MEMORANDUM OPINION

The above-styled adversary proceeding[1] was tried to the court on August 22 and 23,

[1] Adversary proceedings commenced by the Gallaghers and Oetting against Defendants were consolidated with the Kirchners' case by court order of July 1, 2003. Trial of the adversary was delayed by the unfortunate and untimely death of Plaintiffs' initial counsel.

2005. At trial the court heard testimony from Plaintiffs Michelle Kirchner ("Kirchner" and, with her husband John, the "Kirchners"), Paul Gallagher ("Gallagher" and, with his wife Laura, the "Gallaghers"), and Judith Oetting ("Oetting" and, together with the Kirchners and Gallaghers, "Plaintiffs"); and Defendants Michael Sticht ("Sticht") and Roberta Craven ("Craven" and, with Sticht, "Debtors"). The parties offered into evidence a number of exhibits identified as necessary below. The court exercises core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(J). This memorandum opinion embodies the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. Background

The Kirchners, the Gallaghers and Oetting each entered into a contract for construction of a house with Debtors, then doing business under the names Woman's Touch Custom Homes and Woman's Touch Interiors and Gifts. The Kirchners' contract (Plaintiffs' Exhibit A-1; hereafter an exhibit will be designated by "PX" or "DX" and identifying number) dated July 5, 2000, provided that Debtors would build on a lot acquired by Debtors a home based on a specified custom plan for $135,000, $17,000 to be paid in advance of construction.[2] Kirchner testified that she and her husband selected Debtors because of (1) the involvement of a woman (Craven) in the construction; (2) Sticht's assurance that higher cost accessories could be included in the quoted price of the home; (3) Sticht's assurance that the home would be finished in 180 days; and (4) a long-standing acquaintance with Debtors through church. Following execution of the contract, the Kirchners paid Debtors $16,000. Debtors obtained a construction loan of $94,400 against

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[2] The contract provides for a $17,000 payment to Debtors (PXA-1, ¶ 2). It appears, in fact, that the Kirchners paid only $16,000 in advance. See PXA-2.

which they drew construction costs.

Kirchner testified that the home actually built by Debtors did not include above-grade accessories. The Kirchners' home was built with the wrong color roof.[3] Kirchner also thought that Craven would have more involvement in the building of the home than she in fact did.

Ultimately the Kirchners did not close on their home; it remained property of Debtors until foreclosed on by the construction lender. In accordance with a requirement in their contract (PXA-1, ¶3), Kirchner obtained a loan commitment from Awesome Financial Group ("Awesome")[4], on July 4, 2000. *See* PXA-3. When closing approached, however, Awesome declined the loan because the Kirchners provided incorrect social security numbers on documents. *See* PXA-4. Kirchner testified that the use of incorrect numbers was inadvertent and could have been corrected with some time and effort. The Kirchners decided, rather, to terminate the contract with Debtors and demand return of their up-front payment.[5] This they did by letter dated June 17, 2001. *See* PXA-5.

The Gallaghers' situation was different than the Kirchners' in that they retained Debtors to act as their agents in building a home on a lot they owned in Southlake, Texas. Their contract[6] with Debtors specifies that Debtors will receive a 22.1% commission on most funds expended in building the home. *See* PXC-1, ¶ 6.

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[3] Sticht suggested Kirchner approved the color change. Kirchner testified she did not recall doing so. Gallagher had the same issue (wrong colored roof), and he and Kirchner both received from Sticht the response "hope for hail" when they complained. The court finds Sticht installed a roof of the wrong color on the Kirchner home.

[4] Awesome's name appears to come from its principal (Alexander Awesome), not from its qualities as a lender.

[5] The Kirchners sought return of $17,000, though they had paid just $16,000.

[6] The contract between Debtors and the Gallaghers was dated March 3, 2000. There was a delay of

Because the Gallaghers owned the building lot and would act as their own general contractors with Debtors acting as their agent, the Gallaghers obtained a construction loan in the amount of $300,000. Gallagher established a bank account to handle disbursements of the construction loan on which he and Sticht had joint signature power; each check issued from the account required Gallagher's signature.

At the time of execution of the contract, Gallagher's mother-in-law provided a $25,000 check to Debtors. This payment does not appear to have been a requirement of the contract. Sticht testified that Debtors ultimately applied the $25,000 to builder's fees due pursuant to the contract. *See* PXL.

The Gallaghers chose Debtors to oversee the building of their home because of the involvement of a woman—Craven—in its construction. However, Gallagher testified to a number of deficiencies in the performance of the contract, including inadequate plumbing, a malfunctioning gas fireplace, a faulty alarm system, installation of the wrong roof and some shoddy workmanship.

Debtors oversaw construction of the Gallaghers' home through September 2001. In September 2001, the Gallaghers took possession of their "finished" home.

Oetting, also desiring a woman's participation in the building of her house, entered into her contract with Debtors (PXB-1) on April 25, 2000. She purchased her own lot and promised to pay Debtors $138,000 to construct her home. (PXB-1, p.1). Because she owned the land, like the Gallaghers, she, rather than Debtors, obtained a construction loan. On the other hand, unlike the Gallaghers, she did not act as her own general contractor. Thus, as was the case with the

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about six months before construction began due to the need to obtain city approval of the house plans.

Kirchners, on the Oetting job cost overruns (other than from change orders) were absorbed by Debtors. In February of 2002, before completion of her home, Oetting terminated her contract with Debtors (which they acknowledged they could not complete) and hired a second contractor, Metro Craft Services, to finish the home. *See* PXI-2. Oetting paid $19,616 (including the cost of several changes from the original plans) to complete her house. *Id.* She had previously paid out approximately $138,077 to Debtors (the total available from the construction loan).

Each of the Kirchners, the Gallaghers and Oetting asserted claims against Debtors.[7] Debtors filed for relief under chapter 7 of the Bankruptcy Code[8] (the "Code") on August 9, 2002. In their schedules and statement of affairs, Debtors failed to fully reflect, *inter alia*, the claims of and suits by Plaintiffs.

II. Discussion

In this adversary proceeding, Plaintiffs seek denial of Debtors' discharge under Code § 727 as well as a determination that Debtors' debts to them are not dischargeable under Code § 523. The court concludes that, under controlling precedent, Debtors' discharge must be denied. However, the court addresses Plaintiffs' claims under section 523 as well, since, as discussed below, it is possible that, on appeal, Debtors will be determined to be entitled to a discharge. *See Best Int'l, U.S.A. v. Tucker & Clark*, 2001 U.S. Dist. LEXIS 4969, at *17 (N.D. Tex. April 19, 2001) (though unclear from the record whether plaintiff sought a certain type of relief, because it was arguably the only remaining relief plaintiff could seek, the court would address the issue); *Guan Shan Liao v. United States DOJ*, 293 F.3d 61, 69-70 (2nd Cir. 2002) (stating that, for

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[7] The Plaintiffs each retained Mr. James Curtis as legal counsel in order to pursue appropriate collection measures against the Debtors in state court. After Debtors filed their bankruptcy case, Plaintiffs brought the adversary proceedings, now consolidated before the court, in order to protect their rights.

purposes of completeness, the court would address the merits of the argument on the issue); *Blockton Cahaba Coal Co. v. United States*, 24 F.2d 180, 181 (5th Cir. 1928) (stating that it is a duty of the trial court to make complete findings of fact upon all the issues).

A. Section 727

Plaintiffs have asserted that Debtors' discharge should be denied pursuant to Code §§ 727(a)(2) (fraudulent transfer of property), 727(a)(3) (destruction of or failure to keep records) and 727(a)(4) (false oath). The evidence does not support denial of Debtors' discharge under sections 727(a)(2) and 727(a)(3). Debtors adequately explained at trial the property dispositions cited by Plaintiffs as support for their case under section 727(a)(2). Further, the chapter 7 trustee has not (to the court's knowledge) attacked as fraudulent any transfer by Debtors. As to section 727(a)(3), all the evidence at trial indicated that Debtors maintained sufficient records; there is no evidence before the court of destruction of records.

With respect to section 727(a)(4), Debtors' discharge should be denied if, *inter alia*, Debtors "knowingly and fraudulently, in or in connection with [their bankruptcy case] . . . made a false oath or account . . . ." Code § 727(a)(4)(A). It has long been held that a violation of this section occurs through knowing and fraudulent material misstatements in the schedules or statement of affairs filed in a debtor's bankruptcy case.[9] *See, e.g., Farmers Co-Operative Ass'n v. Strunk*, 671 F.2d 391, 395 (10th Cir. 1982); *Williamson v. Fireman's Fund Ins. Co.,* 828 F.2d 249, 252 (4th Cir. 1987).

On the record before it, the court cannot find that any of the misstatements alleged by

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[8] 11 U.S.C. §§ 101, *et seq*.

[9] A debtor executes his or her schedules and statement of affairs under penalty of perjury. *See* Official Forms

Plaintiffs[10] were made knowingly and fraudulently.[11] However, the courts have held that a debtor's discharge may be denied by reasons of errors or omissions in schedules and statement of affairs that amount to a reckless disregard for the truth. *See Sholdra v. Chilmark Fin. LLP (In re Sholdra)*, 249 F.3d 380 (5th Cir. 2001); *Beaubouef v. Beaubouef* (*In re Beaubouef)*, 966 F.2d 174 (5th Cir. 1992); *Jordan v. Bren (In re Bren)*, 303 B.R. 610 (B.A.P. 8th Cir. 2004); *La Vangie v. Mazzola (In re Mazzola)*, 4 B.R. 179 (Bankr. D. Mass. 1980) (citing *Diorio v. Kreisler-Borg Const. Co. (In re Diorio)*, 407 F.2d 1330 (2d Cir. 1969)); *see also Boroff v. Tully (In re Tully)*, 818 F.2d 106 (1st Cir. 1987) (reckless indifference to truth is equivalent to fraud).

This court has previously held that controlling precedent requires a finding of reckless disregard for the truth if a debtor's schedules and statement of affairs contain numerous errors. *See United States Trustee v. Moschella (In re Moschella)*, No. 03-47690-DML-7, 2004 Bankr. LEXIS 1108 (Bankr. N.D. Tex. Aug. 9, 2004); *see also Cadle Co. v. Mitchell* (*In re Mitchell)*, 102 Fed. App. 860 (5th Cir. 2004) and Dupre v. Schott (*In re Dupre*), 2005 App. Lexis 15735 (5th Cir. 2005). Although *Mitchell* and *Dupre* (neither of which was published as precedent) can

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6 and 7.

[10] The errors and omissions in Debtors' schedules included, *inter alia*: (1) failing to list a pending lawsuit naming Debtors as defendants brought by a Mr. Lester; (2) failing to mention the Kirchners' suit in the appropriate place in the schedules; (3) failing to disclose the sale of a home valued at over $82,000 to Skip and Carolyn Gibson, which took place on July 16, 2002, approximately three weeks before Debtors filed their bankruptcy petition; (4) misrepresenting the nature of the Gallaghers' suit by characterizing it as a "$4,500 roof dispute"; (5) similarly mischaracterizing the nature of Oetting's suit by labeling it an "owner's warranty liability contract dispute;" (6) failing to reflect one or more plaintiffs in litigation against Debtors on schedule F; and (7) failing to disclose fully the circumstances of a transfer of property to Sticht's daughter.

[11] The requirement of materiality is clearly met, given that the conduct of Debtors' business and disposition by them of certain assets cannot be fully understood without information omitted from their schedules and statement of affairs.

be read as inconsistent with Cadle Co. v. Pratt (*In re Pratt*), 411 F.3d 561 (5th Cir. 2005),[12] there has been no specific disapproval of those cases that find that a number of errors and omissions in schedules and statement of affairs constitutes a reckless disregard for the truth *per se*.[13] Moreover, though not effective for this case, Congress recently amended chapter 9 of Title 18 to require that bankruptcy courts report to the United States attorney any "materially fraudulent statement in a bankruptcy schedule." 18 U.S.C. §158. From this change in the law, the court infers that Congress shares the concern of the appellate courts with incorrect schedules.[14]

For these reasons, though the court cannot find on the record a basis to conclude that Debtors "knowingly and fraudulently" misstated facts in their schedules and statement of affairs, the court holds, based on the number of errors and omissions, that Debtors prepared their schedules and statement of affairs with a reckless disregard for the truth. Thus, Debtors' discharge must be denied.

B. Section 523

Plaintiffs assert two bases[15] for exception of their claims from Debtors' discharge. First,

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[12] In *Pratt*, the debtor was a compulsive liar and a drug abuser. Possibly significant was that Pratt died before trial of his discharge case. 411 F.3d at 564. Nevertheless, Pratt's schedules contained a number of errors, and, though the Court of Appeals did not address whether those errors amounted to reckless disregard for the truth, it cited *Beaubouef* (411 F.3d at 566) and presumably rejected its application to Pratt.

[13] The court notes that factors such as a debtor's competence, the complexity of a debtor's affairs, whether a debtor has the assistance of counsel, and the availability of information could affect the nature and applicability of any *per se* rule. These issues do not arise in the case at bar.

[14] The low tolerance of the courts for mistakes in schedules represents a different approach than that adopted for other grounds for denial of discharge. Generally, the courts have been reluctant to set the bar to discharge too high. *See In re Jones*, 490 F.2d 452, 456 (5th Cir. 1974) (statutory provisions relating to discharge should be construed liberally in favor of the debtor and against the objecting creditor); *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996) (same); *see also Rosen v. Bezner*, 996 F.2d 1527, 1534 (3d Cir. 1993) (denial of discharge is an "extreme penalty").

[15] Oetting and the Kirchners also allege nondischargeability under Code §§ 523(a)(3) and 523(a)(6) in their complaints, but the evidence does not support these claims, and Oetting and the Kirchners did not press them at trial.

they contend that their debts represent "money [or] property . . . obtained by . . . false pretenses, a false representation, or actual fraud . . . ." (Code § 523(a)(2)(B)). Second, they urge that their claims against Debtors arise from Debtors' "fraud or defalcation while acting in a fiduciary capacity. . . ." (Code § 523(a)(4)).

1. Section 523(a)(4)

Plaintiffs argue that the debts to them are not dischargeable under a Texas law that makes construction funds in the hands of a contractor trust funds.[16] The court has previously addressed this question. *See Foxworth-Galbraith Lumber Co. v. Dissmore (In re Dissmore)*, Adv. No. 03-4459-DML (Bankr. N.D. Tex. Oct. 25, 2004). Although Plaintiffs filed a post-trial letter brief explaining why the court should not follow its prior decision and the Fifth Circuit's decision in *Boyles v. Abilene Lumber, Inc*., 819 F.2d 583 (5th Cir. 1987), there does not appear to be good reason for the court to reverse itself. In order for a debt to qualify as not dischargeable under Code § 523(a)(4), the defalcation or fraud must occur with respect to a fund that has the express characteristics of a trust. *See In re Twitchell*, 91 B.R. 961, 964-965 (D. Utah 1988), *citing Davis v. Aetna Acceptance Co*., 293 U.S. 328, 334 (1934); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1362 (10th Cir. 1996). The funds held by Debtors were not held in that sort of trust nor does Texas law provide in section 162.001 for that sort of trust relationship.

Furthermore, Plaintiffs have failed to show by a preponderance of the evidence that Debtors misappropriated any funds over which they had control. Various exhibits presented at

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[16] TEXAS PROPERTY CODE § 162.001 states in pertinent part:

> (a) Construction payments are trust funds under this chapter if the payments are made to a contractor or subcontractor…under a construction contract for the improvement of specific real property in this state.

trial (e.g., PXG-1 – PXG-6, PXI-1 and PXI-3 and PX-6) reflect a reasonable level of record keeping; the accounts reviewed by the court show that payments from funds borrowed by the Gallaghers[17] and Oetting were used to pay bills[18] or builder's fees for the Gallagher and Oetting homes respectively.[19]

The Gallaghers also argue that the agent-principal relationship created by their contract with Debtors made Debtors fiduciaries. However, a principal-agent relationship is insufficient to trigger operation of section 523(a)(4). *See* 4 COLLIER ON BANKRUPTCY ¶ 523.10[1][d] (15th ed. rev. 2005); *Air Traffic Conference of America v. Paley (In re Paley)*, 8 B.R. 466, 469 (Bankr. E.D.N.Y. 1981) ("The existence of a principal-agent relationship…does not create a fiduciary relationship"); *Borg-Warner Acceptance Corp. v. Miles (In re Miles)*, 5 B.R. 458, 460 (Bankr. E.D. Va. 1980) ("The courts have attempted to avoid making the exception so broad that it reaches such ordinary commercial relationships as debtor-creditor and principal-agent").

Accordingly, the court concludes and holds that Debtors did not defraud or defalcate as to any of Plaintiffs while acting in a fiduciary capacity. To the extent Plaintiffs seek relief under Code § 523(a)(4), it must be denied.

2. Section 523(a)(2)(B)

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[17] Notably Gallagher cosigned each check withdrawing funds from the account for the Gallagher home.

[18] Although Plaintiffs argued that Debtors failed to obtain lien releases in construction of Plaintiffs' homes, no liens appear to have been filed against any of Plaintiffs. If Debtors *did* fail to pay a subcontractor, that subcontractor (having lost his lien rights), not one of Plaintiffs, would be the proper party to assert a claim of misappropriation.

[19] Debtors retention of the $16,000 paid by the Kirchners was not a misappropriation of funds. As previously discussed, the Kirchners arguably forfeited their deposit by failing to close, since their termination of the contract was due to their unwillingness to pursue fully a permanent mortgage from Awesome. As to the $25,000 paid to Debtors by Gallagher's mother-in-law, Sticht's testimony made clear that those funds were handled generally as contemplated by the parties. *See* PXL.

Plaintiffs have presented more than enough evidence to sustain their burden in a breach of contract case.[20] The evidence may even be sufficient to support a grant of punitive damages. But even if Plaintiffs can carry the burden necessary to such a holding, this does not equate to satisfying the burden for demonstrating non-dischargeability.[21]

The courts adhere to a three point test in determining nondischargeability of a debt by reason of its incurrence through false representations or upon false pretense:

1. There must be a knowing and fraudulent falsehood.

2. The falsehood must describe past or current facts.

3. The other party must have relied on the truth of the misrepresentation.

Recoveredge v. Pentecost, 44 F. 3d 1284, 1293 (5th Cir. 1995) (*quoting In re Allison*, 960 F.2d 481, 484 (5th Cir. 1992)). *See also*, *Gen. Elec. Capital v. Acosta (In re Acosta)*, No. 02-0639, 2003 U.S. Dist. LEXIS 23450, at *56 (E.D. La. Dec. 30, 2003); *Ceballos v. Thomas (In re Thomas)*, No. 03-38389, 2005 Bankr. LEXIS 284, *at 13 (N.D. Tex. Feb. 23, 2005); *Kennedy v. Kight (In re Kight)*, No. 04-36917, 2005 Bankr. LEXIS 784, at *2 (N.D. Tex. Apr. 26, 2005).

The test for whether discharge of a debt should be denied for fraud has five prongs:

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[20] The court is not called upon to decide whether Debtors breached the contracts with Plaintiffs—nor were Debtors required to controvert allegations of breach in order to defend in this adversary proceeding. The court thus specifically arrives at no conclusion as to whether Debtors breached any of the contracts before the court (though Sticht admitted breach of Oetting's contract). The contract with the Kirchners could be argued as breached by the Kirchners as well as Debtors, in that the Kirchners might have been able to obtain a mortgage from Awesome. Failing to pursue their financing would thus leave them arguably in default. PXA-1, ¶ 3. The court, of course, does not so hold, but offers this example of avenues available to Debtors in defending breach of contract claims by Plaintiffs.

[21] In Texas, a plaintiff may only recover punitive damages if he can show that the harm for which he seeks recovery is the result of: (1) fraud, (2) malice, or (3) gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003. While the court believes that Plaintiffs might be able to obtain a punitive damages award based upon a showing of gross negligence, the court is unable to conclude that Debtors defrauded Plaintiffs. As gross negligence is not a ground for non-dischargeability under § 523, Plaintiffs might be able to satisfy their burden for the recovery of punitive damages in a state court proceeding even though their debts are not non-dischargeable.

1. The debtor must have made a false representation.
2. The debtor must have known the representation to have been false when made.
3. The debtor must have made the representation with the intent and purpose of deceiving the creditor.
4. The creditor must have relied on the representation.
5. The creditor must have suffered damages through such reliance.

Pentecost, 44 F.3d at 1293. *See also In re Orphaug*, 827 F.2d 340 (8th Cir. 1987); *In re Perez*, 155 B.R. 844 (Bankr. E.D.N.Y. 1993); *In re Ellis*, 152 B.R. 211 (Bankr. E.D. Tenn. 1993).

Plaintiffs' cases under section 523(a)(2)(B) fail these tests on a number of grounds. First, a failure to keep a promise will not ordinarily meet the requirements of a false representation. *See In re Bercier*, 934 F.2d 689, 692 (5th Cir. 1991) ("A mere promise…is not sufficient to make a debt non-dischargeable, even though there is no excuse for the subsequent breach") (quoting 3 COLLIER ON BANKRUPTCY ¶ 523.08[4] (15th ed. 1991)); *In re Stone*, 91 B.R. 589, 592 (D. Utah 1988) ("…a promise or representation of intention to act is insufficient [to make a debt non-dischargeable]"). Thus, a failure to perform under any of the contracts with Plaintiffs would not suffice.

Similarly, the court is not prepared to hold that Debtors, merely by representing their competence as homebuilders, obtained money or property from Plaintiffs through a false representation. Even if the court were prepared to hold that Debtors were not competent to perform their contracts with Plaintiffs (and the court is not[22]), this by itself, absent more egregious facts, would not justify denial of discharge of Debtors' debts to Plaintiffs. In the case at bar, there is no evidence of such egregious facts, such as, for example, a representation by Sticht that he possessed a skill which he knew he did not have.

Specific representations—regarding Craven's involvement in the business, Debtors' solvency, the cost of construction and time required for completion—do not serve to bar discharge under Code § 523(a)(2)(B). Sticht explained Debtors' crumbling financial condition. Between embezzlement by an employee and the effect on their business of the events of 9/11, Debtors were unable to continue in business beyond Spring of 2002. However, there is no evidence in the record of financial trouble in 2000 when Plaintiffs entered into their contracts with Debtors. Thus, the court does not find Plaintiffs were induced to enter into their contracts by a false representation of Debtors' solvency.

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[22] With the possible exception of the Gallagher home (which was in a higher price range and a different geographical area than most of the jobs undertaken by Debtors), the evidence suggests Debtors completed numerous contracts to the satisfaction of the homeowners. See Sticht's testimony respecting DX1 – DX4. Indeed, Oetting testified she was satisfied with her home, including Debtors' work, but for the substantial overrun in its cost. As noted above, the Kirchners arguably defaulted on their contract—as opposed to Debtors. Thus, the court has difficultly finding even a general misrepresentation of competence to either Oetting or the Kirchners. It appears that only in the case of the Gallaghers was Debtors' performance so deficient as to even raise questions about basic competence.

As for Craven's involvement in Debtors' business, the expectations of Plaintiffs were of future work by Craven. Although Craven testified that she "retired" in 1998, she also testified that she continued to take an interest in the business and helped out when she could. Further, there is no evidence that any one of the Plaintiffs asked for and was denied her advice or assistance. Finally, Oetting expressed satisfaction with her home and, in any event, terminated her contract with Debtors before the house was complete. Craven might have helped with decoration as contemplated by Oetting had Debtors finished the home. The Kirchners, similarly, terminated their contract with Debtors, and the court cannot find that that termination did not preclude Craven from doing her part of the job.[23]

As to representations concerning construction time and cost, these obviously involved future facts. Also, at least respecting cost, Debtors written construction estimates provided to Plaintiffs (*see, e.g.,* PXN-1) included a disclaimer that warned of potential 15% overruns in costs.[24] There is no evidence in the record to support a finding that Debtors knowingly and with deceitful intent misestimated the time or cost of construction of any of Plaintiffs' homes.

For the foregoing reasons, the court holds that Debtors' indebtedness to Plaintiffs is not non-dischargeable under Code § 523(a)(2)(B) and the relief sought pursuant to that section must be denied.

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[23] Kirchner also was not clear as to what she expected from Craven, stating in her testimony that Craven, she thought, was involved in the financial end of the business.

[24] The Kirchners come closest to meeting the requirements of section 523(a)(2)(B) in that Kirchner testified that Debtors represented that higher quality items would be included in the $138,000 cost of their home. Not only was there little specificity in Kirchner's testimony (which principally related to flooring), but termination of the Kirchners' contract on the basis of lack of financing is not consistent with a finding that Kirchners were damaged through reliance on this specific representation.

III. Conclusion

For the reasons stated above, the court holds Debtors' discharge must be denied pursuant to Code §727(a)(4). Otherwise the relief sought by Plaintiffs must be denied. Counsel for Plaintiffs is instructed to submit to the court a final judgment consistent with this opinion.

END OF MEMORANDUM OPINION